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ALEXANDER L. ST
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No. 80-1680

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

CHEVRON CHEMICAL COMPANY, a corporation,
Petitioner,

vs.

Administrator,
United States Environmental Protection Agency,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITIONER'S REPLY BRIEF

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Respondent ignores the dangerous precedents which would result if the Court of Appeals' opinion is allowed to stand. Respondent's only efforts to support that opinion are based upon omissions of pertinent portions of the

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* There have been no material changes in the stock interests of petitioner or its parent since the petition was filed.

record[1] and on misstatements of the legislative history.

In stating that the 1947 statute "did not prohibit" the use of trade secret data; that the 1972 statute, "for the first time, limited" the use of trade secrets; and that the 1975 statute provided that "the limitations * * * were applicable only to data submitted on or after January 1, 1970" (Br. in Opp., pp. 3, 4, 5), respondent ignores the real issue. The critical question is not what Congress prohibited but whether Congress authorized the use of pre-1970 trade secret data for the benefit of the submitter's competitors (see Pet., pp. 15-16).

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[1] For example, respondent conceded below that, for purposes of the judgment, it must be assumed not only that Chevron's data included trade secrets but also that USDA's practice was not to use such secrets on behalf of a competitor (Pet., pp. 3, 11-12). Therefore, contrary to respondent's assertion on page 14, Chevron's "legitimate expectation" against such use was based on both state law and pre-1970 agency practice.

The statement that, in 1978, "Congress provided that the agency was entirely free to consider data as to which any period for exclusive use or compensation had expired" (Br. in Opp., p. 11) is misleading. In fact, that authorization was limited to post-1969 data (Pet., Appx. C, A-66; see also Br. in Opp., p. 8). The district court nonetheless attempted to expand the 1978 statute to include pre-1970 data. It did so on the basis of its conception of what Congress might have intended and thus ran afoul of basic principles of statutory construction (see, e.g., Pet., p. 16, ftn. 7). The Court of Appeals did not affirm on that ground but on the erroneous theories discussed in the petition which, for the most part, respondent ignores.[2]

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[2] Respondent's reliance on the Tucker Act (Br. in Opp., p. 16) illustrates the failure to support the reasoning of the Court of Appeals. Application of that Act is limited to action authorized by Congress (28 U.S.C. § 1491). It could only apply if, as the district court held, Congress had authorized the challenged use of Chevron's data.

On pages 12-13, respondent attempts to obscure the issue by treating the violation of Chevron's trade secret rights as a mere "internal use" of Chevron's data. But "internal" use for regulatory purposes does not include the right to use trade secrets for the benefit of Chevron's competitors. In Kramer, for example, the Second Circuit did not hold that the Army could not use Kramer's trade secrets. What it held was that the Army violated Kramer's rights by using those secrets for the benefit of Kramer's competitors (Pet., Appx. E, pp. A-74 to A-75).

Respondent's reliance on the reasoning of the district court is a virtual concession that the Court of Appeal's opinion is erroneous and should be reviewed. At the very least that decision should be vacated and remanded to

consider the issues presented in the district court.

Respectfully submitted,

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